(17)

No. 99-1908

Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

In The

Supreme Court of the United States

NOV 13, 2000

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION IN SUPPORT OF PETITIONERS

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
1802 Alonzo Waterford Sr. Drive
Indianapolis, IN 46202
(317) 917-6222

DAVID P. BRUTON*
*Counsel of Record
MICHAEL W. MCTIGUE JR.
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215) 988-2700

Counsel for Amicus Curiae National Collegiate Athletic Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

QUESTION PRESENTED

Whether Congress intended to create a private cause of action for unintentional discrimination by recipients of federal funds, thereby subjecting the recipients to suits by private individuals to enforce disparate impact regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964, without prior notice to the recipients and bypassing the federal agency review and enforcement process established by Congress.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. CONGRESS DID NOT INTEND TO CREATE A PRIVATE CAUSE OF ACTION UNDER TITLE VI OR ITS ACCOMPANYING REGULATIONS FOR ACTS HAVING AN ALLEGED DISPARATE IMPACT 10

A. Title VI Proscribes Only Intentional Discrimination 10

B. The Plain Language Of Title VI Does Not Support The Creation Of An Implied Private Right To Enforce Unintentional Discrimination 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Choate, 469 U.S. 287 (1985) 11, 12

Boulahanis v. Board of Regents, 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2762 (2000) 7

Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980) 7

Buchanan v. City of Bolivar, 99 F.3d 1352 (6th Cir. 1996) 7, 8

Buchanan v. City of Bolivar, *Elston v. Talladega County Bd. of Educ.*, and *Larry P. v. Riles*, *supra*, note 9 8

Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir. 1999) 7

Cannon v. University of Chicago, 441 U.S. 677 (1979) 11

Caractor v. Town of Hempstead Dep't of Urban Renewal, No. 97-9150, 1998 U.S. App. LEXIS 20186 (2d Cir. June 11, 1998) 7

Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986) 7

Central Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164 (1994) 17, 18

Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), *judgment vacated as moot*, 119 S. Ct. 22 (1998) 7

City of Chicago v. Lindley, 66 F.3d 819 (7th Cir. 1995) 7

Cort v. Ash, 422 U.S. 66 (1975) 13, 14

Cureton v. NCAA, 37 F. Supp. 2d 687 (E.D. Pa. 1999) 3, 4

TABLE OF AUTHORITIES – Continued

Page

Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999).....5, 6

Elston v. Talladega County Bd. of Educ., 997 F.2d 1394 (11th Cir. 1993).....7, 8

Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1239 (2000) 7

Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998) 11, 15, 16, 17

Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985) 7

Goshen Road Environmental Action Team v. United States Dept. of Agriculture, No. 98-2102, 1999 U.S. App. LEXIS 6135 (4th Cir. 1999) 7

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) 11, 12

Indianapolis Minority Contractors Ass'n, Inc. v. Wiley, 187 F.3d 743 (7th Cir. 1999) 7

Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) 7, 8

Latinos Unidos de Chelsea en Accion (Lucha) v. Secretary of Housing & Urban Dev., 799 F.2d 774 (1st Cir. 1986) 7

NAACP v. Medical Center, Inc., 657 F.2d 1822 (3d Cir. 1981) 7

New York City Environmental Justice Alliance v. Giuliani, 214 F.3d 65 (2d Cir. 2000) 7

New York Urban League v. New York, 71 F.3d 1031 (2d Cir. 1995) 7

TABLE OF AUTHORITIES – Continued

Page

Pfeiffer v. School Bd. of Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) 7

Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) 7

Quarles v. Oxford Municipal Separate Sch. Dist., 868 F.2d 750 (5th Cir. 1989) 7

Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978) 11

Suter v. Artist M., 503 U.S. 347 (1992) 14

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 14

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 14

United States v. LULAC, 793 F.2d 636 (5th Cir. 1986) 7

Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996) 7

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 19

STATUTES

20 U.S.C. § 1092(e) 2

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* ..... *passim*

REGULATIONS

45 C.F.R. § 80.1..... 1

34 C.F.R. § 100.1..... 1

LEGISLATIVE MATERIALS

110 Cong. Rec. 5255 (1964)..... 18

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

NCAA Division I Graduation Rates Report 2

NCAA Research Report 96-01: A Longitudinal Analysis of NCAA Division I Graduation Rates Data 4

INTEREST OF AMICUS CURIAE[1]

The National Collegiate Athletic Association ("NCAA") is a voluntary, unincorporated association of more than 1,200 members, consisting primarily of public and independent colleges and universities throughout the country, which adopts and helps to enforce rules – including academic standards for athletic eligibility – governing intercollegiate athletic competition between its members. The NCAA's interest in this case stems from a lawsuit presently pending before the United States Court of Appeals for the Third Circuit, *Cureton v. NCAA*, Civil No. 00-1559. Filed on behalf of a national class of African-American student-athletes, the suit challenged the association's academic standards for freshman eligibility to participate in intercollegiate athletics, claiming that the standards for Division I colleges and universities[2] violate Title VI regulations issued by the Department of Health and Human Services and the Department of Education.[3]

---

[1] The written consent of both parties accompanies this brief. Counsel for the NCAA authored the brief in its entirety. No person or entity, other than the NCAA, has made a monetary contribution to the brief.

[2] Division I membership is comprised of approximately 300 of the nation's largest colleges and universities. To qualify for Division I, these institutions must, among other things, sponsor a minimum number of sports for men and women.

[3] The regulations of the Department of Health and Human Services and the Department of Education are published at 45 C.F.R. § 80.1, *et seq.*, and 34 C.F.R. § 100.1, *et seq.*, respectively. They are similar in all material respects to the regulations at issue in the instant case.

Like the Department of Justice and Department of Transportation regulations at issue in this case, these regulations bar recipients (public or private) of federal financial assistance from using criteria that have a racially discriminatory effect.

The *Cureton* suit was not brought because African-Americans are under-represented in intercollegiate athletics. In fact, the proportion of athletic scholarships awarded to African-Americans is more than twice the size of their representation in the general student population.[4] Rather, the NCAA was sued because its Division I member institutions, acting out of concern about the exploitation of student-athletes recruited for college without regard to their prospects for graduation, have chosen to include a minimum standardized test score as a component of the standards for freshman eligibility to compete in intercollegiate athletics.

The *Cureton* case illustrates the unanticipated litigation risks to which private recipients of federal funds can be exposed if an implied private right of action for disparate impact is found to exist under the implementing regulations of Title VI. The district court in *Cureton* first upheld the existence of such an implied private right of action, and subsequently enjoined use of the minimum

[4] According to data reported by the NCAA to the Department of Education pursuant to 20 U.S.C. § 1092(e), blacks constituted 9.9% of all students enrolled at NCAA Division I institutions in the fall of 1996, but held 24.2% of the athletic scholarships awarded by those institutions (1997 NCAA Division I Graduation Rates Report, p. 625).

standardized test score component of the NCAA's Division I standards for freshman eligibility. *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

Just how distant the target of a disparate impact claim can be from intentional discrimination is illustrated by the history of the eligibility standards at issue in *Cureton*. In 1983, when barely one-third of Division I African-American student-athletes were graduating from college, a rule called Proposition 48 was adopted by Division I members to require that a student earn a minimum GPA of 2.0 in certain core high school courses and achieve modest minimum scores on the Scholastic Achievement Test ("SAT") or American College Test ("ACT") to be eligible for participation as a freshman in Division I intercollegiate athletics.[5] Proposition 48 declared that the classroom, and not the athletic field or arena, should be the central focus of a student's attention during freshman year if his or her objectively measured academic skills did not meet certain basic levels.

Following the adoption of Proposition 48, Division I college graduation rates for all student-athletes showed immediate improvement by more than 10%, and the most dramatic improvement – a gain of no less than 27% – occurred in the graduation rate of African-American student-athletes (up from an average of 35% in the last

[5] The minimum required test score under Proposition 48 was a combined (math and verbal) SAT score of 700, or an ACT sum score of 68. These minimums, achieved by 85% of all students who take the tests, are also embodied in Proposition 16, the current successor to Proposition 48, which was adopted in 1992.

three classes entering college *before* the implementation of Proposition 48 in 1986, to an average of 45% for the first four classes entering college *after* its implementation).[6] This was accomplished with only a moderate decrease (from 27% to 24%) in the proportion of athletic scholarships awarded to African-Americans in the same classes. As a result, the *number* of graduating African-American student-athletes at Division I schools significantly increased under Proposition 48. In 1992, the NCAA Division I members passed Proposition 16, which further tightened the freshman eligibility requirements by substituting a sliding scale index composed of standardized test scores and high school GPAs, while retaining the minimum scores and GPAs from Proposition 48.[7]

The NCAA's use of minimum standardized test scores as a component of the standards for freshman eligibility would appear to be a rare example of a program intended to raise levels of academic achievement that has actually worked. But in the arena of disparate impact claims, no good deed is assured of going unpunished. Thus, four student-athletes who failed to meet the minimum test scores requirement of Proposition 16 sued the NCAA in *Cureton* on behalf of themselves and similarly situated individuals. Under their disparate impact theory, plaintiffs did not allege that standardized

---

[6] NCAA Research Report 96-01: A Longitudinal Analysis of NCAA Division I Graduation Rates Data.

[7] Under the dual index imposed by Proposition 16, the higher the student's GPA, the lower the required test score, and vice versa. In no event, however, can the test score or the GPA be below the minimums specified in Proposition 48.

tests are racially biased. Instead, they merely argued that a disproportionate share of African-American student-athletes failed to achieve the required minimum test score and were thereby rendered ineligible for competition as freshman. Thus, like Respondents in the present case, plaintiffs sought to use statistical differences to maintain that they are the victims of unintentional but unlawful discrimination.

In October 1998, the district court denied the NCAA's motion to dismiss and concluded that a private right of action could be maintained to redress claims of disparate impact under Title VI's regulations. Thereafter, the case proceeded with expensive and time-consuming discovery, cross-motions for summary judgment, and an eventual ruling by the district court that enjoined the NCAA's further use of minimum test scores because they were found not to be demonstrably related to the NCAA's admittedly legitimate goal of improving the graduation rate of student athletes. On appeal to the Third Circuit, the decision of the district court was reversed on the grounds that the applicable Title VI regulations are program-specific, and therefore do not reach the NCAA's athletic eligibility rules, which are not part of any program or activity that receives federal funds. *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999).[8] Within a few months, however, the United States Department of Education

---

[8] On remand, plaintiffs sought leave to file an amended complaint alleging that the NCAA's eligibility standards constitute purposeful racial discrimination. The district court denied leave to file such an amended complaint, and plaintiffs have taken a second appeal to the Third Circuit (No. 00-1559), which was argued on November 9, 2000.

issued proposed amendments to its program-specific Title VI regulations to make them institution-wide. If adopted, these amendments would circumvent the rationale of the Third Circuit's decision in *Cureton*.

Thus the question whether Title VI of the Civil Rights Act of 1964 – legislation that prohibits only *intentional* discrimination in any program that receives federal funds – provides by implication for a private right of action to challenge alleged unintentional discrimination is of considerable importance to the NCAA and its members. If private actions for disparate impact are permitted, as held in this case by the United States Court of Appeals for the Eleventh Circuit, the consequences for admissions practices may be severe. Public and private colleges and universities (virtually all of which receive federal funds) will be exposed to the expensive burden of defending claims under Title VI whenever two allegations can be made: first, that the institution has enrolled a smaller proportion of minority students than is found in the pool of potential applicants, and second, that proportionately more minority students would be admitted if a specific minimum academic standard for admission were eliminated or lowered. The well documented racial gap in standardized test scores as well as high school grade point averages ensures that almost any selective admissions standard could be subject to a disparate impact challenge. This is not to suggest, of course, that such claims would succeed. But even if the school could ultimately prevail by providing appropriate reasons for its choice of the minimum academic standard it has selected, the burden of defending itself in litigation is certain to be substantial.

Ironically, the use of disparate impact theory in private actions under Title VI has rarely proved to be a useful tool for combating unlawful discrimination. Research discloses twenty-three other cases with appellate decisions that upheld or (in most instances simply assumed) the existence of an implied private right of action to enforce regulations under Title VI.[9] But in only *three* of those cases did plaintiffs succeed in obtaining

---

[9] *New York City Environmental Justice Alliance v. Giuliani*, 214 F.3d 65 (2d Cir. 2000); *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2762 (2000); *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999); *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1239 (2000); *Indianapolis Minority Contractors Ass'n, Inc. v. Wiley*, 187 F.3d 743 (7th Cir. 1999); *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999); *Goshen Road Environmental Action Team v. United States Dept. of Agriculture*, No. 98-2102, 1999 U.S. App. LEXIS 6135 (4th Cir. 1999) (unpublished opinion); *Caractor v. Town of Hempstead Dep't of Urban Renewal*, No. 97-9150, 1998 U.S. App. LEXIS 20186 (2d Cir. June 11, 1998) (unpublished opinion); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *judgment vacated as moot*, 119 S. Ct. 22 (1998); *Buchanan v. City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996); *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *City of Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *New York Urban League v. New York*, 71 F.3d 1031 (2d Cir. 1995); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993); *Pfeiffer v. School Bd. of Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); *Quarles v. Oxford Municipal Separate Sch. Dist.*, 868 F.2d 750 (5th Cir. 1989); *Latinos Unidos de Chelsea en Accion (Lucha) v. Secretary of Housing & Urban Dev.*, 799 F.2d 774 (1st Cir. 1986); *United States v. LULAC*, 793 F.2d 636 (5th Cir. 1986); *Castaneda v. Pickard*, 781 F.2d 456 (5th Cir. 1986); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984); *NAACP v. Medical Center, Inc.*, 657 F.2d 1822 (3d Cir. 1981); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980).

final injunctive relief on their Title VI claims.[10] By far the most frequent outcome of private disparate impact litigation under Title VI has been that plaintiffs' claims are ultimately dismissed, but only after time consuming, burdensome and expensive litigation. The NCAA and its member institutions have a legitimate interest in avoiding such litigation if it is without any legislative basis.

SUMMARY OF ARGUMENT

This Court has repeatedly identified congressional intent as the key to determining the existence and scope of an implied private right of action under a federal statute. In the case of Title VI, that intent is readily ascertainable from the language and structure of the statute. Section 601 of Title VI is an exercise of Congress' Spending Power under the Constitution. It prohibits racial discrimination by grantees under any program or activity receiving federal financial assistance. This Court has definitively construed Section 601 as reaching only intentional discrimination, and has found an implied private right of action for redress of such intentional discrimination.

Section 602 of Title VI does not create any additional substantive rights, but merely confers power on federal agencies to effectuate the provisions of Section 601 through rules and regulations consistent with achievement of the objectives of the statute authorizing the

[10] *Buchanan v. City of Bolivar*, *Elston v. Talladega County Bd. of Educ.*, and *Larry P. v. Riles*, *supra*, note 9.

financial assistance in connection with which the action is taken. The sole remedy provided is administrative, in the form of agency termination of federal assistance to the offending recipient, or other means provided by law, with the express proviso that no such agency enforcement action may be taken without first giving the recipient the opportunity for voluntary compliance. There is no provision for any private right of enforcement of the regulations. Section 603 provides for judicial review of agency action that is taken under Section 602.

As recognized by the Eleventh Circuit Court of Appeals, this Court has not squarely determined whether an implied private right of action exists under Section 602. But the Eleventh Circuit's ruling that Title VI – which itself is limited to intentional discrimination – somehow implicitly authorizes a private right of action under disparate impact regulations that themselves provide only an administrative remedy simply cannot be reconciled with the language, structure and manifest purpose of the legislation. Whether or not administrative regulations can ever validly provide for an express private right of action for relief beyond the scope of the relief available under the enabling statute itself, it is surely improper to *imply* such a right of action in the absence of compelling evidence of a legislative intention to permit such claims. There is no such compelling evidence that Congress contemplated private enforcement of Title VI in adopting the statute, let alone private claims for disparate impact. The plain truth is that the Eleventh Circuit's conclusion, to the extent that it turns on a reading of supposed congressional intent, is an exercise in judicial legislation that is conceptually incoherent.

Finally, the beneficial impact of permitting private claims for disparate impact is dubious. As illustrated by the NCAA's experience in defending academic standards adopted in good faith by the nation's leading educational institutions, disparate impact claims frequently invite judicial second guessing of decisions that unavoidably have statistically different impacts on discrete groups of Americans. Disparate impact claims are notoriously complex and expensive to litigate, with a strikingly low rate of success. There is no warrant for concluding that Congress, in seeking to ban intentional discrimination by recipients of federal funds, intended to subject those recipients to private claims based solely on disparate outcomes.

ARGUMENT

I. CONGRESS DID NOT INTEND TO CREATE A PRIVATE CAUSE OF ACTION UNDER TITLE VI OR ITS ACCOMPANYING REGULATIONS FOR ACTS HAVING AN ALLEGED DISPARATE IMPACT.

A. Title VI Proscribes Only Intentional Discrimination

Section 601 of Title VI prohibits entities that receive federal financial assistance from discriminating on the ground of race, color or national origin. 42 U.S.C. § 2000d. In order to enforce this prohibition, Congress empowered and directed all federal agencies "to effectuate the provisions of Section [601]" through regulations. Section 602, 42 U.S.C. § 2000d-1. Section 602 details the specific procedures to be followed if an agency determines that a

recipient of federal funds violates Section 601 or an implementing regulation. On its face, the statute makes no mention of any private remedial enforcement mechanism.

This Court has consistently held that Section 601 is co-extensive with the Fourteenth Amendment in reaching only intentional discrimination. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (opinion of Powell, J.); 328 (opinion of Brennan, White, Marshall and Blackmun, J.J., concurring in judgment in part and dissenting in part) (1978); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610-11 (opinion of Powell, J., concurring in judgment, joined by Burger, C.J. and Rehnquist, J.); 612 and n.1 (opinion of O'Connor, J., concurring in judgment); 641-42 (opinion of Stevens, J., dissenting, joined by Brennan and Blackmun, J.J.) (1983); *Alexander v. Choate*, 469 U.S. 287, 294 n.11 (1985). Although the statute expressly provides only an administrative enforcement remedy, this Court has recognized – without squarely deciding the issue – the existence of a limited implied private right of action under Section 601. *Cannon v. University of Chicago*, 441 U.S. 677, 702, n.33 (1979); *see Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1994 (1998) (Title IX). Any private right implied under Section 601, however, may cover only the intentional discrimination that is prohibited by that section. *See Guardians*, 463 U.S. at 610-11 (opinion of Powell, J., concurring in judgment, joined by Burger, C.J. and Rehnquist, J.); 612 and n.1 (opinion of O'Connor, J., concurring in judgment); 641-42 (opinion of Stevens, J., dissenting, joined by Brennan and Blackmun, J.J.). Even though a majority in *Guardians* determined that Section 601 proscribed only intentional discrimination, a

separate majority of the deeply-splintered Court seemed to conclude that an agency could adopt regulations under Section 602 proscribing acts that unintentionally produced discriminatory effects.[11] Justice Marshall, writing for a unanimous Court in *Alexander*, subsequently summarized the holding in *Guardians*, as follows:

> . . . [A] two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that *Title VI itself directly reached only instances of intentional discrimination*. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that *Title VI had delegated to the agencies* in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. 287 at 293-94 (emphasis added).

The Eleventh Circuit properly recognized that this Court has never directly addressed whether a private party may seek relief against a recipient of federal financial assistance under Title VI regulations proscribing unintentional discrimination when the statute itself only

---

[11] Justice O'Connor noted this anomaly and argued that such regulations "cannot validly serve as the basis for liability" because it would "proscribe conduct that Congress did not intend to prohibit." *Id.* at 615 (opinion of O'Connor, J., concurring in judgment).

proscribes intentional discrimination. But it failed to reconcile Title VI's purely administrative enforcement mechanism with the creation of a private remedy under the regulations that would wholly circumvent the administrative remedy. The existence of such a private right of action simply cannot be inferred from the text of the statute or the regulations.

B. The Plain Language Of Title VI Does Not Support The Creation Of An Implied Private Right To Enforce Unintentional Discrimination

In 1975, this Court adopted a four part test for determining whether a statute that does not expressly create a private right of action has impliedly done so:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted). This four factor analysis was applied in *Cannon* to support the finding of an implied private right of action for intentional gender discrimination under Title IX, but the subsequent opinions of this Court have consistently viewed

with skepticism the creation of additional implied rights of action under silent statutes. Rather, the Court has emphasized repeatedly that the overriding judicial goal must be the determination of congressional *intent*, using the ordinary tools of statutory construction. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) ("The central inquiry remains whether Congress intended to create either expressly or by implication, a private cause of action. Indeed the first three factors discussed in *Cort* – the language and focus of the statute, its legislative history, and its purpose, – are ones traditionally relied upon in determining legislative intent") (citations omitted); *accord Suter v. Artist M.*, 503 U.S. 347, 364 (1992) ("The most important inquiry here as well is whether Congress intended to create the private remedy sought by the plaintiffs."); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted."). In this case, the inquiry begins and ends with the statutory language.

This Court has already examined congressional intent with regard to the scope of Title VI, and concluded that Section 601 of the statute itself prohibits only intentional discrimination. While it might be argued that the Court accepted that executive agencies charged with enforcing Title VI may proscribe unintended discrimination by regulation, the authority to adopt such regulations is conferred by Section 602 and is therefore necessarily subject to the limitations of that section. The clear and unambiguous language of Section 602 demonstrates that the regulations contemplated by that section cannot form the basis of a private right of action to

challenge behavior that the statute itself does not proscribe. Section 602 authorizes the adoption of regulations that may provide for administrative termination of federal funding, but requires that an agency provide a recipient of federal financial assistance with notice of a violation and an opportunity to come into compliance. In the words of the statute:

> no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured through voluntary means.

Thus, Congress expressly limited the remedy for a regulatory violation to an administrative proceeding.

This reading of Section 602 is consistent with the fundamental contractual nature of Title VI. Only recipients of federal financial assistance must comply with its provisions. Title VI provides terms that must be included in the contract between the recipient and the federal government whereby the recipient agrees not to discriminate in exchange for the receipt of the money. As this Court has stated with respect to a similar provision in Title IX, the statute conditions "an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997 (1998). As part of this contractual relationship under Title VI, an agency must follow the procedures set forth in Section 602 in order to take any action against a recipient. The recognition of an independent private right of action to enforce

regulations covering unintentional discrimination would bypass this contractual relationship entirely and thwart the legislative scheme adopted by Congress.

The decision in *Gebser* is directly on point. The Court there ruled that a school district recipient of federal financial assistance cannot be monetarily liable under Title IX, one of Title VI's progeny, for a teacher's alleged sexual harassment of a student unless the district had "actual notice" of, and demonstrated "deliberate indifference" to, the charges. *Gebser*, 118 S. Ct. at 1997, 1999. The Court grounded its decision on the plain language of the statute, which, like Title VI, expressly provides for an administrative remedy that contains certain procedural protections for the recipient. "[W]e generally examine the relevant statute to ensure that we do not fashion the parameters of an implied right in a manner at odds with the statutory structure and purpose." *Id.* at 1996. Both Title VI and Title IX provide for notice and opportunity for voluntary compliance *before* an agency may commence appropriate proceedings to prevent the use of federal dollars for discriminatory purposes. Neither contemplates liability in the absence of administrative action. The *Gebser* Court recognized the inconsistency of sanctioning the creation of remedies not authorized by such a statute:

> It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.

Id. at 1999.

Like the school district in *Gebser*, the Alabama Department of Public Safety, as a recipient of federal financial assistance, has not been found to have engaged in any intentional discrimination such that the statutory requirement of notice should be ignored. Therefore, the department, like the school district, is entitled to notice and an opportunity to come into voluntary compliance with the implementing regulations if the funding agency believes that it has violated Title VI.

This plain reading of the statute comports with other recent decisions of this Court that have eschewed the creation of any private liability when the text of the statute plainly suggests otherwise. In 1994, the Court refused to read aider and abettor liability into the language of section 10(b) of the Securities Exchange Act of 1934. *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994). In reaching its decision, the Court reasoned that a private plaintiff alleging violations of section 10(b) and SEC Rule 10b-5 is limited by the text of the statute:

> With respect, however, to the first issue, the scope of conduct prohibited by § 10(b), the text of the statute controls our decision. In § 10(b) Congress prohibited manipulative or deceptive acts in connection with the purchase or sale of securities. It envisioned that the SEC would enforce the statutory prohibition through administrative and injunctive actions. Of course, a private plaintiff now may bring suit against

> violators of § 10(b). *But the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b). To the contrary, our cases considering the scope of conduct prohibited by § 10(b) in private suits have emphasized adherence to the statutory language, " 'the starting point in every case involving construction of a statute.' "*

Id. at 173 (citations omitted) (emphasis added). The Court made a clear distinction between acts prohibited by the statute and acts prohibited by regulation. Therefore, there can be no private right of action under implementing regulations that proscribe conduct not contemplated by the statute.

With respect, there is no warrant for exempting civil rights legislation from scrutiny under the ordinary standards of statutory construction that are exemplified in this Court's decision in *Central Bank*. Those standards do not depend on judicial notions of desired public or private policy relating to the sensitive subject of race. The task of statutory construction is always the same: to give effect to the discernable intention of Congress in enacting the statute in question. One may legitimately question whether a regulation can ever properly provide for the private enforcement of substantive rights not conferred by the authorizing statute, but certainly the existence of such rights cannot properly be implied without the most compelling supportive legislative history. In the case of Title VI, no such history exists. Significantly, major proponents of Title VI in 1964 recognized that Section 602 did not create any substantive rights beyond those created by Section 601. *See, e.g.*, 110 Cong. Rec. 5255 (1964).

The Eleventh Circuit has cited no contemporaneous legislative history to the contrary.

Thus, the Court need not address the broader question of whether administrative regulations can ever create substantive rights not provided by the enabling statute. It is enough to recognize that the language and structure of Title VI unmistakably do not contemplate the existence of a private cause of action to challenge instances of alleged unintentional discrimination. Whether or not Congress can be said to have intended in Title VI to authorize regulations proscribing unintentional discrimination even though the statute itself does not, it simply makes no sense to *imply* a private right of action under those regulations that would circumvent the one remedy that *is* expressly contemplated by the statute and provided by the regulations.

The Eleventh Circuit's decision, if left undisturbed, will subject public and private entities receiving any amount of federal financial assistance to claims that all kinds of decisions by these entities have adversely affected a protected group. The courts will be engaged in the unenviable business of reexamining the decisions of those who are in the best positions to make such determinations. In the case of the NCAA or any of its member institutions, judges will be asked to substitute their own judgments for that of academic institutions that have balanced a number of competing interests in setting academic standards they believe are in the best interests of all student-athletes. *Cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989) (warning that under some disparate impact inquiries defendants "could be haled into court and forced to engage in the expensive and time-

consuming task of defending" their practices). Congress manifestly did not intend such a result.

CONCLUSION

For all of the above reasons, the Court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit, and remand with instructions to dismiss the action with prejudice.

Respectfully submitted,

ELSA KIRCHER COLE
General Counsel
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
1802 Alonzo Waterford Sr. Drive
Indianapolis, IN 46202
(317) 917-6222

DAVID P. BRUTON*
*Counsel of Record
MICHAEL W. MCTIGUE JR.
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
(215) 988-2700

Counsel for Amicus Curiae National Collegiate Athletic Association

Dated: November 13, 2000